

**BEFORE THE DEPARTMENT OF JUSTICE  
FOR THE STATE OF MONTANA**

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| In the Matter of the Application | ) |                         |
| by Benefis Healthcare for        | ) | <b>FINDINGS OF FACT</b> |
| Modification to the              | ) |                         |
| Certificate of Public Advantage  | ) |                         |

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This matter is before the Department pursuant to Benefis Healthcare's (Benefis) request for modifications to the Certificate of Public Advantage (COPA) that the Department issued in conjunction with its approval of the consolidation of the two Great Falls hospitals. These findings are issued pursuant to Section 17.2 of the Terms and Conditions of the COPA which provides:

The Consolidated Hospital may request modifications to or the repeal of any terms and conditions in the COPA that it believes are justified by unforeseen circumstances, changed conditions in the marketplace or other reasons. The Department will grant such requests if it determines that the requested modifications are necessary to promote lower costs, improved access to health care or higher quality health care or, in respect of modifications to Section 1.3, 2.11 or 3.1 of these Terms and Conditions, if the Department determines that the requested modifications are necessary to provide sufficient funding to the Consolidated Hospital to ensure quality health care.

**I. BENEFIS'S REQUEST FOR MODIFICATIONS TO THE COPA.**

On December 6, 2002, Benefis filed a petition with the Department requesting the following modifications to the COPA:

1. Exclude all investment income from the revenue cap;

2. Increase the inflationary factor in the existing revenue cap model by adding an additional one percent each year for the next four years;
3. Modify Sections 5.3, 5.4, and 5.5 of the COPA to allow Benefis to enter exclusive contracts with anesthesiologists<sup>1</sup>;
4. Modify Section 2.15 of the COPA to require employee and medical staff surveys every three years instead of annually;
5. Eliminate the annual reporting requirements in Sections 1.5-2, 1.5-3, and 1.5-4;
6. Modify the quality reporting indicators in Section 2 of the COPA in collaboration with the Department of Public Health and Human Services and amend Section 2.12 to require annual quality reporting rather than quarterly reporting which is now required; and
7. Modify Section 8.1 to allow equity type partnering on surgical facilities or services.<sup>2</sup>

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See Benefis Healthcare Petition for Modification of the Certificate of Public Advantage, available at

<http://www.doj.state.mt.us/safety/greatfallshospital/petitionformodificationofcopa.pdf>

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1. Initially, Benefis requested that the COPA be modified to permit exclusive contracts with all hospital-based physicians. By letter dated January 20, 2003, Benefis limited the request to anesthesiologists. See Letter from Mr. Goodnow, attached as Exhibit A.

2. This request was withdrawn by letter dated January 20, 2003. See Exhibit A.

Benefis contends that these modifications are necessary for it to maintain quality services and financial viability. Id. Letters were submitted to the Department by numerous physicians, other health care providers, and members of the community. Most of the comments supported Benefis's position that if relief is not granted under the existing revenue cap, the quality of health care that Benefis can deliver will significantly deteriorate. A small number of comments opposed Benefis's request for modifications to the COPA, asserting that the hospital has not maintained high quality health care services, has mismanaged its revenue, and has spent too much money on unneeded capital improvements.

On January 30, 2003, the Department held a public meeting in Great Falls to allow public comment on the modification proposal. Public comments at the hearing overwhelmingly supported Benefis's request for modification of the COPA. On January 24, 2003, Benefis provided the Department with a written response to the Department's December 31, 2002, request for additional information.

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## **II. FINDINGS.**

Pursuant to Section 17.2 of the COPA, the Department makes the following specific findings based upon the application of Benefis, other materials and information submitted by Benefis in support of that application, letters, written public comments, and the information presented at the January 30, 2003, public hearing, and the evaluation

conducted by the Department's consultants, as well as additional information submitted by Benefis in response to the consultant's evaluation.

**A. The Impact of Changes in the Marketplace on the COPA Revenue Cap.**

Benefis contends that changes in the health care industry over the last five years have resulted in increased costs to Benefis that were not anticipated by the Revenue Cap Model. Benefis contends that competition for outpatient surgery services increased significantly in Great Falls after 1996, causing Benefis to lose a significant share of services which are typically more profitable than other hospital services.

According to Benefis, "as the hospital has lost services that cost the least to provide, the average cost to generate a dollar of net revenue has increased. As a result, the hospital's costs today are higher than the cost base used by the COPA's revenue cap model." Benefis Petition p. 8. Benefis supports that conclusion with the results of its COPA Expenses Analysis that reflects "actual costs over target" of \$4.8 million in 1997, increasing to a projected amount of \$13.2 million in 2002. *See Exhibit H to Petition.*<sup>3</sup>

Benefis also contends that the MBI Inflation Index used in the Revenue Cap does not reflect the actual cost increases experienced by Benefis in Montana. As a result of these two factors, Benefis contends that it has not been able to earn the six percent margin

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3. After making appropriate adjustments for "bad debt expense," Benefis concedes that the original cost difference reflected in its COPA Expense Analysis is overstated by "approximately one half." (January 14, 2003, letter from Wayne Dunn to Kelly O'Sullivan.)

that the COPA was designed to allow if "Benefis were able to achieve the targeted cost savings." Benefis Petition p. 1.

The Department disagrees with the assertion that the COPA was designed to allow Benefis to earn a six percent margin by achieving the targeted cost savings. In addition to achieving "the targeted cost savings," the COPA requires that Benefis control its general operating expenses in order to achieve the targeted margin. At page 3 of the Petition, Benefis notes that "the intent of the Revenue Cap Model was to establish controls on Benefis' net revenues, thereby indirectly controlling price increases and operating expenses." (Emphasis added). The Department also notes that Benefis has not attempted to quantify the effect of the alleged "anomalies" in the Revenue Cap. Accordingly, the Department concludes that Benefis has not demonstrated that the difference between its actual margins and the six percent margin set forth in the COPA is due solely to "anomalies" in the Revenue Cap Model.

The Department finds, however, that Benefis has identified changed conditions in the market place that justify some modifications to the COPA. Based on data provided by Benefis and information obtained by the Department through its own investigation and public comment, the Department believes that modifications to the Revenue Cap are justified on the following grounds:

1. The Department finds that Benefis' compliance with the Revenue Cap has resulted in significant savings to health care consumers over the past six years. In 1997,

Benefis implemented pricing reductions that included reduced room rates and ancillary service charges, with particular emphasis on discounting prices for selected outpatient, diagnostic, and therapeutic services. In general, prices in 2000 were still below pre-merger price levels. See, Independent Accountant's Report for FY 2000 p. 12. Fiscal Year 2001 marked the first time since the merger that prices, in the aggregate, returned to and exceeded pre-merger prices. Overall prices in 2001 were only 3.2 percent higher than pre-merger price levels. See, Independent Accountant's Report for FY 2001 p. 11. There is also evidence that Benefis' prices are significantly lower than comparable hospitals in Montana.<sup>4</sup> The Department finds that the Revenue Cap has achieved the purpose of insuring that merger-related savings are passed on to consumers;

2. Competition for outpatient surgery services (which are typically more profitable than other hospital services) increased significantly in Great Falls after 1996;

3. The Revenue Cap Model assumes a constant relationship between costs and revenues. There is evidence that this relationship has changed over the last six years. To the extent this has occurred, the Revenue Cap Model may understate Benefis' actual costs. Among the costs incurred by Benefis that may not be fully reflected in the baseline cost

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4. *See* Benefis Healthcare Annual Report –Fiscal Year 2000 p. 3. Comparisons of prices charges by different hospitals is difficult due to variations in billing methods and availability of data. The Department recognizes that hospital pricing comparisons are subjective. The independent accountant retained by the Department to administer the revenue cap regulation has confirmed (without quantifying amounts or percentages), that Benefis' prices have been significantly lower than comparable hospitals in Montana.

calculation of the Revenue Cap are: (a) payments for anesthesiology services necessary to maintain adequate coverage for surgical procedures provided at Benefis; (b) increased expenses resulting from recent shortages in nursing services; and (c) higher costs for pharmaceutical and medical devices and supplies utilized by Benefis;

4. To the extent that costs/revenue relationships have changed from the base period, use of the MBI Inflation Index may not accurately reflect all of Benefis' costs.

**B. Requested Modifications to the Revenue Cap.**

Based on these findings, the Department concludes that the following relief requested by Benefis is justified.

1. The Department grants Benefis' request to remove investment income from the Revenue Cap. The Department agrees with Benefis' contention that the inclusion of investment income under the Revenue Cap creates an unexpected incentive for Benefis to spend reserves, even when borrowing would be more economical. Accordingly, the Department grants this request. This change will be applied retroactively to fiscal year 2002.<sup>5</sup>

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5. The exclusion of investment income shall be accomplished by modifying Worksheet 7 of the Revenue Cap Model. The caption for Line 4, "Total Hospital Revenue," shall be modified to read "Total Hospital Revenue Exclusive of Investment Income." The value corresponding with Line 4 shall be the sum of the above Line 1, "Net Patient Revenue per Audit," and Line 2, "Other Operating Revenue per Audit." Line 3, "Investment Income," shall not be included in the sum on Line 4. Lines 10 through 22, "Net Revenue from Excluded Services," shall be modified such that investment income from excluded services is not excluded again from the calculation of "Adjusted Hospital Revenue."

2. The Department grants in part and denies in part Benefis' request to increase the inflation factor by one percent per year for each of the next four years. The Department finds that a 1% increase for 2002, a 2% increase in 2003, and a 2.5% increase for the years 2004 and 2005 is necessary to provide sufficient funding to Benefis to insure quality health care. To the extent that Benefis requests greater increases to the inflation factors, the request is denied.<sup>6</sup>

**C. The Department Grants the Request to Allow Exclusive Contracts with Anesthesiologists on a Case-by-Case Basis.**

Benefis asked that the COPA be modified to allow it to enter into exclusive contracts with anesthesiologists. The Department finds that Section 5.5 of the COPA should be amended to allow Benefis to enter into exclusive contracts with anesthesiologists subject to the restrictions set forth in Section 5.5.

Benefis also requests that Sections 5.3 and 5.4 of the COPA be amended to allow Benefis to restrict the ability of contracting anesthesiologists to provide services or procedures outside the Consolidated Hospital. Benefis argues that this restriction is justified because it has incurred significant costs in recruiting anesthesiologists in order to

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6. The increase of the MBI inflation index shall be accomplished by modifying Worksheet 3 of the Revenue Cap Model. Line 18a, "Inflation Add-on," and Line 18b, "Adjusted Inflation Index" shall be added. The value of Line 18a, "Inflation Add-on," shall be 0.01 in 2002, 0.02 in 2003, and 0.025 in 2004 and 2005. The value of the second new line, 18b, shall be the sum of Line 18, "Inflation Index," plus Line 18a. The value of Line 19, "Allowable Total Costs in Current Dollars," shall be the product of Line 3, "Allowable Total Costs in 1995 Dollars," times Line 18b (instead of line 18).



insure that there is sufficient coverage for procedures performed at Benefis. Benefis contends that such restrictions on anesthesiologists are necessary to insure that proper coverage is maintained.

The Department finds that based on current market conditions, the restrictions requested by Benefis will not injure competition and may promote the legitimate purposes of improving efficiency and coverage in the provision of anesthesiology services at Benefis. The Department concludes, however, that such restrictions are only appropriate where Benefis can demonstrate that the restrictions are necessary for the efficient operation of the hospital. Accordingly, the Department denies Benefis' request to amend Sections 5.3 and 5.4. The Department will amend Section 5.5 to add the following sentences:

Consolidated Hospital may also petition the Department for approval to enter into exclusive contracts that require the contracting physicians to work exclusively for the Hospital if the Department concludes that such restrictions will not unreasonably restrain competition and are necessary to promote the quality, efficiency or availability of health care services at Benefis. The Department may require the Hospital to eliminate such restrictions at any time if it determines that physician exclusivity unreasonably restrains competition.

Pursuant to Section 5.5 (as amended), the Department hereby approves Benefis's request to enter into mutually exclusive agreements with anesthesiologists.

**D. The Department Grants Benefis's Request to Modify the Annual Survey Requirement, But Requires Bi-Annual Surveys.**

Benefis contends that the COPA requirement of annual medical staff and employee surveys is too frequent and is actually counterproductive. Benefis requests that the COPA be modified to require such surveys once every three years in order to allow Benefis sufficient time to assess survey results, develop action plans, communicate action plans to physicians and employees, and implement the plans before the next survey. Benefis contends that annual surveys do not allow enough time to respond to one survey before the next, causing negative attitudes and relationships to develop based on the perception that surveys are not responded to by the hospital administration. While the Department agrees that annual surveys are too frequent, the Department concludes that bi-annual surveys are appropriate until such time as employee and medical staff surveys demonstrate a level of satisfaction that would allow less frequent surveys. As noted in the Department's preliminary findings on Benefis's progress in meeting the objectives of the COPA, good employee relations are vital to quality patient care.

**E. The Department Grants Benefis's Request to Eliminate the Annual Reporting Requirements in Sections 1.5-2, 1.5-3, and 1.5-4.**

Benefis has made a compelling case that these reporting items should be eliminated. The requirements are no longer relevant now that the merger is complete. Sections 1.5-2, 1.5-3, and 1.5-4 will be deleted from the COPA.

**F. The Department Grants the Request to Modify the Quality Reporting Indicators in Section 2 of the COPA But Denies the Request to Allow Annual Quality Reporting.**

Benefis contends that many of the quality reporting indicator elements required by the COPA are no longer available and others are of marginal value for purposes of measuring service quality. Benefis correctly points out that the reporting elements may be modified by changing the interagency agreement between the Department of Health and Human Services and the Department without amending the COPA. The Department agrees with Benefis's assessment of the quality reporting indicators. The Department hereby orders that the quality reporting indicators be reviewed, and a new set of quality reporting indicators be selected by PHHS, after consultation with Benefis. These quality indicators will be incorporated into a new agency agreement between PHHS and the Department.

Based on continuing concerns that PHHS needs to be able to monitor quality of care in a timely fashion, the Department denies the request for annual reporting on quality indicators. The Department believes that continued quarterly reporting on quality indicators remains appropriate.

**G. The Role of the Regional Community Health Council.**

While Benefis did not raise this issue in its request for modification, the Regional Community Health Council has struggled to define a role for itself over the past several years of its existence. The anticipated volume of consumer complaints that were to have

been reviewed by the Regional Community Health Council did not materialize. This is due, in part, to the efforts of the ombudsman selected by Benefis pursuant to Sections 2.16-2.17 of the COPA. As a result, the Attorney General invites the Community to comment until December 31, 2003, on the proper role and function of the Regional Community Health Council. Comments should be submitted to Attorney General Mike McGrath, Justice Building, P.O. Box 201401, Helena, MT, 59620-1401, or e-mailed to [contact@doj.state.mt.us](mailto:contact@doj.state.mt.us).

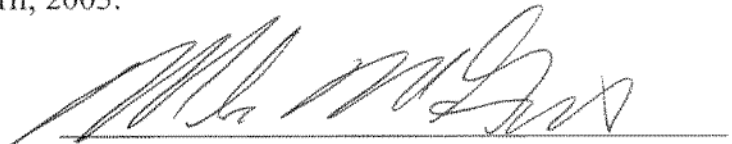
### **III. CONCLUSION.**

The COPA expressly anticipates that modifications of its terms and conditions may be necessary to meet the objectives of lower health care costs and improved quality of or access to health care services in a changing health care environment. *See* COPA, § 17. As the health care market in the Great Falls area evolves through increased competition from ambulatory surgery centers, ancillary service providers, and other competitors, more extensive modifications to the COPA may be justified. However, in view of the relatively short period since issuance of the COPA and for the reasons set forth above, the Department concludes that the above-referenced adjustments are sufficient to allow Benefis to meet the demands of providing quality health care while maintaining lower consumer prices.

The Department takes very seriously the comments submitted by the public concerning the need to maintain the quality of care at Benefis. To the extent financial

relief is granted to the hospital by this decision, Benefis has assured the Department and the Community that those resources will be used to improve the quality of services available to hospital patients and healthcare consumers in Great Falls. The Department will continue to monitor Benefis's compliance with that commitment in order to maintain community confidence in Benefis's stated mission of providing cost-effective, quality healthcare services to the people of north-central Montana.

DATED this 4<sup>th</sup> day of April, 2003.

  
MIKE MCGRATH  
Attorney General

# Benefis

HEALTHCARE



RECEIVED

JAN 22 2003

AGENCY LEGAL  
SERVICES BUREAU

January 20, 2003

Mike McGrath  
Attorney General  
State of Montana  
Department of Justice  
P.O. Box 201440  
Helena, MT 59620-1440

Re: Benefis Healthcare/COPA

Dear Attorney General McGrath:

Thank you for our opportunity to visit with you about the COPA matter.

In following up to that discussion, we are amending our Petition for Modification as follows.

With regard to Paragraph 5 (Non-exclusivity), this request will now be made only with respect to anesthesiology. This request for modification does not include any new specialties other than anesthesiology.

In furtherance of that same discussion, Benefis withdraws Paragraph 8 (Agreements with Surgical Facility Providers) from its request.

Because we have been made aware of the concerns of other persons and entities involved in health care in our area, we have deemed these modifications to our Petition to be appropriate.

As always, we thank you for your consideration.

Sincerely,

John Goodnow, Chief Executive Officer  
Benefis Healthcare

cc: Greg Hagfors/Great Falls Clinic  
Terry Cosgrove/Blue Cross  
Wayne Dunn/Benefis Healthcare  
Neil Ugrin/Ugrin, Alexander, Zadick & Hill

EXHIBIT

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Administration

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